Supreme Court, U.S.
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No. 87-1060

In The

Supreme Court of the United States

October Term, 1987

LYNDA CASSIDY TAYLOR LOGEMANN,
INDIVIDUALLY AND AS TRUSTEE OF
THE McCARTY RANCH TRUST,

v. *Appellant,*

ROBERT F. CRAIG, TRUSTEE OF
CASSIDY LAND & CATTLE COMPANY, INC.,

Appellee.

**ON APPEAL FROM THE
SUPREME COURT OF NEBRASKA**

BRIEF IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM

WILLIAM J. RIEB aka
WILLIAM JOHN RIEB
P.O. Box 1682
Sioux City, Iowa 51102
(402) 494-5353

Attorney for Appellant

February, 1988

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the State of Nebraska has sovereign jurisdiction only to do mortgage foreclosures, or whether, in the alternative, the United States Bankruptcy Court has jurisdiction to do mortgage foreclosures, while the Appellee (Debtor) is in a Chapter Eleven Reorganization in Bankruptcy.

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OPINION BELOW

See Appellant's *Jurisdictional Statement* at p. 1 and *Appendix* A at p. 13.

JURISDICTION

See Appellant's *Jurisdictional Statement* at pgs. 2 and 3.

STATUTORY PROVISIONS INVOLVED

See Appellant's *Jurisdictional Statement* at p. 3.

STATEMENT

See Appellant's *Jurisdictional Statement* at pgs. 3 through 9.

THE QUESTION IS SUBSTANTIAL

See Appellant's *Jurisdictional Statement* at pgs. 9 and 10.

ARGUMENT

Without getting into the merits of the case and laying the constitutionality of Neb. Rev. Stat. § 25-2137 (Reissue 1985), (hereinafter referred to as 25-2137), aside,[1] Appellant is merely appealing the applicability of 28 U.S.C. § 157(b)(2) to the case at bar.

To appeal to this Court, the Appellant utilized 28 U.S.C. § 1257(2), which reads, in pertinent part, as follows:

> " . . .where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, *or* laws of the United States and the decision is in favor of its validity."

The statute above is plainly written in the disjunctive term, *or.*

The appellant appealed under the "repugnancy to the laws of the United States".

The federal question sought to be reviewed in this case was very meticulously raised in the Nebraska Trial Court. In her *Counterclaim* (Appellant's *Jurisdictional Statement* at pgs. 5 and 6), Appellant squarely presented the trial court with the federal question which drew into question the validity of a state statute

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[1] When 25-2137 challenged the applicability of 28 U.S.C. § 157(b)(2) to the case, it was in the very least, naturally *implicit* that the Courts of Nebraska would decide this case on the *Supremacy Clause* (U.S. Constitution, *Article VI*) grounds. This implicitly then called into question the *Supremacy Clause* issue of the *unconstitutional application* of 25-2137 to the case at bar.

on the ground of it being repugnant to the laws of the United States.

The case below pitted the validity of 28 U.S.C. § 157(b)(2) as construed and applied, against and opposed to the validity of the Nebraska state statute 25-2137 as construed and its application to this case. *Wilson v. Cook* (1946) 327 U.S. 474. Repugnancy to the laws of the United States implies which statute, state or federal, is to rule sovereign and supreme, in relation to its application to the case.

Black's Law Dictionary describes the word, *valid*, as:

> "Of binding force; legally sufficient or efficacious; authorized by law."

After Appellant's *Counterclaim* was lodged, which raised the application and construction of *either* 25-2137 or 28 U.S.C. § 157(b)(2) to the case, (Appellant's *Jurisdictional Statement* at pgs. 5 and 6), it was the Appellee himself who drew into question the validity of 25-2137 on the ground of its being repugnant to the laws of the United States, namely 28 U.S.C. § 157(b)(2).

The Appellee wanted to make certain this *Counterclaim* of the Appellant went nowhere, so he filed a *Reply* in which he asserted a *general denial* to the *Counterclaim* of the Appellant, generally denying the application of 25-2137 to the case, and of course, affirming his position of the applicability of 28 U.S.C. § 157(b)(2) to the case that bankruptcy courts have jurisdiction to do mortgage foreclosures within the purview of *The Bankruptcy Amendments and Federal*

Judgeship Act of 1984, (Public Law 98-353) codified into 28 U.S.C. § 157(b)(2), in part.

In Nebraska practice, a *general denial* puts in issue all the material averments and permits a party to prove any and all facts tending to negative any of those averments. The effect of the denial is to put the burden on the averring party to establish by evidence the matters denied. *Nebraska Practice Methods and Forms*, § 807.

Also of note, is the fact that Appellant in her *Counterclaim* raised the substantial federal question herein by asserting lack of subject matter jurisdiction of the bankruptcy court to do mortgage foreclosures in line with the mandate of the Supreme Court in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, (1982) 458 U.S. 50. In this, this served under Nebraska practice, as a defense in abatement and bar. Even in the early initial stages of the case, Appellant raised the federal question by a *demurrer* to Appellee's Petition, which *demurrer* was overruled.

Certainly, Appellee overlooks the point that the validity of 25-2137 was called into question on the basis of the applicability of 25-2137 to the case. Involved in the applicability issue is the meaning or construction of the statute. Appellee said 25-2137 simply was not applicable because under his theory of construction 28 U.S.C. § 157(b)(2) applied. Contrariwise, Appellant from the beginning affirmed the applicability of 25-2137 to the case, under her theory of construction.

Appellant raised the issue and the Appellee joined the issue in his *Reply*. Appellant merely supplied the state statute and Appellee eagerly provided the impetus to create the repugnancy.

What more the Appellant could have done is the question.

In order to satisfy this Court's jurisdictional requirement under 28 U.S.C. § 1257(2), indeed, the application and construction of 25-2137 and 28 U.S.C. § 157(b)(2) is itself a federal question, even though the issue, "Does 25-2137 or 28 U.S.C. § 157(b)(2) apply?" reaches beyond this into the merits.

The Supreme Court of Nebraska, in its opinion, did not expressly mention 25-2137 or 28 U.S.C. § 157(b)(2), although both statutes were before that Court in the record and briefs brought up from the Nebraska Trial Court.

Certainly, the Supreme Court of Nebraska was fully apprised that the State Statute, 25-2137 was being assailed as invalid on federal grounds as it applied to the case. The federal grounds were 28 U.S.C. § 157(b)(2).

In broad and sweeping general terms, the Supreme Court of Nebraska was exceedingly careful not to "strike down" the validity of its own Statute on its face, while on the other hand, it implicitly upheld the application of 28 U.S.C. § 157(b)(2) to the case, characterizing the holding of the case upon *Supremacy Clause* grounds.

Further, consistent with the above, while both parties did contest and defend the applicability of each of their respective statutes to the case, the "heart" of 25-2137 itself, was "not striken down", on its face, as being unconstitutional.

The necessary effect, then, of the judgment and decision of the Supreme Court of Nebraska, was to uphold the validity of 25-2137, in indirect terms, and hold 25-2137 inapplicable. Being inapplicable, therefore, the efficacy of 25-2137 was rendered inoperative as applied to the specific facts of this case.

Codifying into this case a workable legal principle that brings this case within the proscriptions of 28 U.S.C. § 1257(2), it may be said that the Nebraska Courts merely "struck down" and *invalidated the application* of 25-2137 as being *unconstitutionally applied* by its terms to the case at hand pursuant to the *Supremacy Clause,* while 25-2137 *itself* was held constitutionally "untouched" and valid on its face.

Since the efficacy of 25-2137 was held inapplicable to the case, but its validity was upheld, the question remains that 25-2137 still applies to the specific facts of this case in that the State of Nebraska has sovereign and supreme jurisdiction to do a mortgage foreclosure under the powers reserved to it under the U.S. Constitution. Therefore, Appellant respectfully urges the Court to take this case.

Appellant verily believes that 28 U.S.C. § 157(b)(2) and part of *The Bankruptcy Amendments and Federal Judgeship Act of 1984* is simply not being construed, interpreted and applied according to this Court's mandate in *Northern Pipeline Construction Company v. Marathon Pipeline Company, supra.* This is why this case is before this Court.

If Appellant is relitigating a federal court's jurisdiction in a state court, as Appellee says, then the

Supreme Court of the United States is the forum to finally lay this issue to rest.

CONCLUSION

The Court should note probable jurisdiction. Appellee's Motion to Dismiss or Affirm should be denied. Noticeably, the substantial federal question sought to be reviewed was timely, properly, fairly and adequately presented and raised at all levels of the Court system in the State of Nebraska and was expressly passed upon. (Supreme Court Rule 16.1(b)). *People of State of New York ex rel. Bryant v. Zimmerman* (1928) 278 U.S. 63.

The case also qualifies for the provisions of 28 U.S.C. § 1257(3).

Respectfully submitted,

WILLIAM J. RIEB aka
WILLIAM JOHN RIEB
P.O. Box 1682
Sioux City, Iowa 51102
(402) 494-5353

Attorney for Appellant